Timekeeping Systems, Inc. *and* Lawrence Leinweber. Case 8–CA–27999

February 27, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On November 12, 1996, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions and brief. The Charging Party filed cross-exceptions and argument in support, and a brief in reply to the Respondent's exceptions and brief. The Respondent filed an answering brief to the General Counsel's cross-exceptions and brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended as modified.[3]

1. The General Counsel and the Charging Party have excepted to the judge's finding in section II, paragraph 5 of his decision that there was no showing that the Respondent had knowledge of any concerted activity by the Charging Party prior to the sending of his first December 5, 1995 e-mail message to the other employees. They argue that it is undisputed that before he sent the e-mail, the Charging Party engaged in conversations concerning the vacation policy proposal with other employees, including Supervisor Dean Chriss. In light of Chriss' supervisory status, the General Counsel and the Charging Party contend that knowledge of the concerted nature of the Charging Party's activities should be attributed to the Respondent.

We agree with the judge, for the reasons stated in his decision, that the Charging Party's sending of the e-mail itself was concerted activity and that the Respondent was aware of the concerted activity when it discharged the Charging Party. In light of this finding, we find it unnecessary to pass on whether the Respondent was also aware of any other concerted activity by the Charging Party before he sent the e-mail to the other employees. Accordingly, we do not rely on the judge's discussion of the General Counsel's argument that Section 7 of the Act was brought into play by the Charging Party's preliminary conversations with other employees.

2. The Respondent has excepted to the judge's statement in section II, paragraph 15 of his decision, that there is no *Wright Line*[4] defense "available here." The Respondent may, of course, assert a *Wright Line* defense in this case.[5] We find, however, that the Respondent has failed to meet its burden under *Wright Line* to show that "the same action would have taken place even in the absence of the protected conduct."

The Respondent's *Wright Line* defense relates solely to the Charging Party's concerted e-mail activity and rests on the same evidence that the Respondent proffered to demonstrate that the conduct was unprotected.[6] The Respondent argues that the Charging Party would have been discharged because of his discourtesy and disrespect without regard to whether he was engaged in protected concerted activity. However, the discourtesy and disrespect that the Respondent contends led to the Charging Party's discharge arose as a part of the sending of the e-mail which we have found, for the reasons set forth by the judge, did not lose the protection of the Act for any reason related to the way it was worded or sent to other employees. Because the protected e-mail conduct resulted in the Charging Party's discharge, we find that the Respondent has failed to demonstrate that it would have discharged the Charging Party absent his protected activity. Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging the Charging Party for engaging in protected concerted activity.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We do not rely, however, on the judge's statement in sec. I, par. 10 of his decision that his "instinct" leads him to credit the Charging Party's testimony that Barry Markwitz, the Respondent's chief operational officer, admonished the Charging Party for having contacted the other employees. In affirming the judge's decision to credit the Charging Party's testimony in this respect, we rely instead on the fact that it was unrebutted.

[3] We shall modify the judge's recommended Order to conform to *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[5] As set forth in his concurring opinion in *Paper Mart*, 319 NLRB 9, 12 (1995), Chairman Gould believes that a *Wright Line* defense, i.e., the showing that the adverse action would have occurred even in the absence of the protected activity, is relevant only to the remedy issued against a respondent employer.

[6] The Respondent has not alleged any reason for the discharge unrelated to the sending of the e-mail and the subsequent events resulting from that activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Timekeeping Systems, Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Within 14 days from the date of this Order, offer Lawrence Leinweber full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

"(b) Make Lawrence Leinweber whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision."

2. Add the following at the end of paragraph 2(d).

"(d) In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 29, 1996."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in concerted activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Lawrence Leinweber full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Lawrence Leinweber whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Lawrence Leinweber, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

TIMEKEEPING SYSTEMS, INC.

Iva Y. Choe, Esq. and *Mark Carissimi, Esq.*, for the General Counsel.

Arthur A. Kola, Esq. and *Elizabeth A. Crosby, Esq. (Crosby, Belock & O'Brien)*, of Cleveland, Ohio, for the Respondent.

Mark A. Rock, Esq. (Schwarzwald & Rock), of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BERNARD RIES, Administrative Law Judge. This case was tried in Cleveland, Ohio, on August 27, 1996. The sole issue presented is whether Respondent discharged Lawrence Leinweber on December 5, 1995,[1] because of his protected concerted activities and therefore violated Section 8(a)(1) of the Act.

On or about October 1, 1996, briefs were received from the General Counsel, the Respondent, and the Charging Party. On the basis of the entire record and after reading the briefs, I make the following findings of fact,[2] conclusions of law,[3] and recommendations.

I. THE FACTS

Respondent is a small Cleveland, Ohio company which manufactures data collection products. The chief operational officer of Respondent is Barry Markwitz. His father, George Markwitz, is nominally the president, but is essentially inactive in the business. Larry Leinweber, the Charging Party, 1 of about 23 employees located in two buildings, was hired by Respondent in April 1995[4] as a "software engineer" who prepared computer programs.

On December 1, Markwitz sent a message to all of Respondent's employees by electronic mail ("e-mail") regarding "proposed plans" for an incentive based bonus system

[1] The complaint erroneously reads "1996."

[2] For purposes of accuracy and clarity, changes in the transcript have been noted and corrected.

[3] There is no dispute that Respondent is an employer engaged in commerce within the meaning of the Act.

[4] All dates hereafter refer to 1995.

(as to which employees were told to "reply with your comments or stop by to see me. A response to this is required.") and changes in vacation policy ("Your comments are welcome, but not required"). The incorporated memorandum regarding the proposed vacation policy changes, which are our only concern here, stated prefatorily, "Please give me your comments (send me an e-mail or stop in and talk to me) by Tuesday, 12/5." The particular suggested policy changes in which we are interested were to close the offices on December 23 and reopen on January 2 and to adjust the number of paid days off over a 5-year period, the effect of which, Markwitz asserted, was that the employees "actually get more days off each year, compared to our present system."

Markwitz received a number of employee responses regarding his vacation proposals, including one on December 1, by e-mail, from Leinweber. Leinweber's response demonstrated that, in fact, the change referred to above would result in the same number of vacation days per year, and less flexibility as to their use.[5] On December 4, Leinweber, having checked his calculations over the weekend, discovered a minor error, and notified Markwitz by e-mail.

Markwitz did not reply to Leinweber's communications. On December 5, Tom Dutton, a member of the engineering team, sent an e-mail to Markwitz, with copies to other engineering team members (which would include Leinweber), reading, "In response to the proposed vacation plan, I have only one word, GREAT!" Promptly, Leinweber, according to his credible testimony, sent an e-mail to Dutton telling him that the proposed policy did not, in fact, redound to the advantage of the employees.

Also on December 5, Leinweber sent a lengthy e-mail message to all employees, including Markwitz. The message spelled out in detail Leinweber's calculations regarding the result of the proposed vacation policy change. It contained, as well, some flippant and rather grating language.

The salutation was "Greetings Fellow Traveler."[6] In his initial remarks, Leinweber wrote, "The closing statement in Barry's memo: 'The effect of this is that you actually get more days off each year, compared to our present system,' will be proven false." This declaration is reiterated in the final thought of the memo: "Thus, the closing statement in Barry's memo . . . is proven false." The paragraph preceding that statement reads, "Assuming anyone actually cares about the company and being productive on the job, if Christmas falls on Tuesday or Wednesday [sic][7] as it will in 1996 and 1997, respectively, two work weeks of one and two days each will be produced by the proposed plan, and I wouldn't expect these to be any more productive than the fragmented weeks that they replace." In closing, Leinweber asked that the recipient "please send errata to the [sic] Larry."

Also on December 5, after reading the e-mail message from Leinweber, Dutton e-mailed again to Markwitz, and also the engineering team (as shown on the e-mail address), saying in part, "After reading Larry's E-mail(s) of this date[,] I realized I had made a mistake in calculating the vacation days and wish to change my comment from 'GREAT' to 'Not so Great' on the proposed vacation policy." Dutton also noted in his message that the proposals had "generated more E-mail than any other plan in the company."

At the hearing, Markwitz at first admitted that he was "angry that Mr. Leinweber sent his e-mail messages to all employees."[8] He prepared on December 5 a memorandum to Leinweber which was conveyed to him by the engineering team leader. The memo stated that Markwitz was "saddened and disappointed" by Leinweber's e-mail, which was "inappropriate and intentionally provocative" and beneath "someone as talented and intelligent as you are." Markwitz then wrote:

> Our employment manual states:
>
> "Certain actions or types of behavior may result in immediate dismissal. These include, but are not limited to:
>
> Failure to treat others with courtesy and respect."

Markwitz went on to "direct" Leinweber to write him, by 5 p.m. that day:

> In light of the above, why this e-mail message was inappropriate
>
> How sending an e-mail message like this hurts the company
>
> How this matter should have been handled

Markwitz continued:

> If your response is acceptable to me, you will post it by e-mail today to those who received your other message.
>
> If you decline to do so, or if your response is unacceptable to me, your employment will be terminated immediately. Otherwise, your employment will continue on a probationary basis for six months, during which time your employment may be terminated at any time and for any reason.
>
> Larry, I am very disappointed in you.

At the hearing, Markwitz testified that what upset him about the document was its "tone": it was a "slap in the face" of employees with good attitudes and a "personal attack" upon him.

At least twice in the afternoon on December 5, Leinweber approached Markwitz to, in Markwitz' words, "tell him what to write." In Markwitz' view, Leinweber was "profess[ing]" not to understand what was wrong with the e-mail message, which confusion Markwitz seriously doubted. He testified that he nonetheless tried to give Leinweber some appropriate suggestions. Leinweber gave a different version of these con-

[5] Markwitz conceded at the hearing the accuracy of Leinweber's correction. It is obvious to me that Markwitz, an impressive person, had inadvertently erred and had not intended to deceive the employees.

[6] Leinweber testified that this was an allusion to an earlier communication by him at the time of a change of Respondent's location.

[7] That same day, Leinweber e-mailed to the same recipients a correction of these references to read "Wednesday or Thursday."

[8] Subsequently, he said that he "may have" stated to Leinweber on December 5 that the latter should have responded to Markwitz privately, rather than sending the message to all employees; but then he denied that he was "upset" by the fact that Leinweber had communicated with the other employees. Although, as noted, I was impressed by Markwitz, I do not believe this inconsistent denial. A December 6 communication to all of the employees following Leinweber's discharge on that day emphasized that the "right way" to handle a "comment" was to discuss it with a manager, see infra.

versations: portraying himself as admitting to an "honest mistake," after Markwitz told him that Leinweber should have contacted him, not the other employees, because "it was up to him to decide what to say to other people"; describing Markwitz as refusing to offer any assistance in preparing the requested memo; and stating that Markwitz branded Leinweber as a "troublemaker." Although, as I have noted, I thought well of Markwitz as a witness, he was not asked to rebut Leinweber's specific charges, such as having called Leinweber a "troublemaker," and, in any event, my instinct is that Markwitz did admonish Leinweber for having contacted the employees; his December 6 e-mail to the employees, discussed infra, picks up the theme that the "right way" for Leinweber to have proceeded was to approach management. Moreover, as noted above, at one point in his testimony, Markwitz testified that, on December 5, he "may have" told Leinweber that he should have pursued the matter privately. For some reason, however, I am inclined to doubt that Markwitz used the word "troublemaker."

Leinweber testified that in his last meeting with Markwitz on December 5, they agreed to extend the memo deadline to 8 a.m. the next day. He further stated that he stayed up well into the morning as he attempted to compose an appropriate letter, but he was unable to come up with anything he deemed satisfactory. When the two men met at 8 a.m., and Markwitz asked if Leinweber had produced a memo, Leinweber said, "No, I couldn't really write anything incriminating, because it could be used against me later." Markwitz wished him luck in his future endeavors and bade him farewell.

Later that day, Leinweber called his supervisor and asked for a discharge letter. The December 9 letter received by him cited as the "Reason [sic] for termination" two of the grounds for dismissal given in the employee manual:

> Failure to treat others with courtesy and respect
> Failure to follow instructions or to perform assigned work

Early on December 6, Markwitz e-mailed all the employees. After discussing the proposal, he turned to "Larry's memo" and how to "address our grievances." He wrote of the impropriety of using "sarcasm or disrespect"; he pointed out that "long or provocative" e-mail messages take up everyone's time and that reading, printing, discussing, and dealing with this memo had "unnecessarily cost our company time and money"; he noted that "the right way" to handle a "grievance, or a question, or a comment, or a complaint" was to discuss it with a team leader or Markwitz or his father; he admitted that he had erred in explaining the proposed vacation policy and he asked employees to inform him if that had changed their minds; and he closed by saying that while he welcomed disagreement, he also demanded that everybody be treated with courtesy. No specific mention was made of Leinweber's discharge.

In September 1995, Markwitz had sent a memo to the members of the engineering team requiring them to work at least 50 hours per week because of production necessities. Leinweber sent a two-word reply: "I refuse." He testified that he expected this to lead to a dialogue with Markwitz, which it did. Leinweber explained to Markwitz that his free time was important to him and that he would rather accept a paycut than work additional hours. According to Leinweber, Markwitz eventually agreed that Leinweber need not work the extra time, "but don't tell anybody." Markwitz's testimony was not seriously inconsistent; he says that he spoke to Leinweber and asked him simply to "do what he can."

As earlier noted, in testifying, Markwitz stressed that it was the "tone" of Leinweber's e-mail, and the ramifications of that tone, which played a dominant role in the discharge. This is reflected in his December 5 memorandum to Leinweber, which mentioned only "Failure to treat others with courtesy and respect." While his December 6 communication makes a point of the time and expense wasted by Leinweber's lengthy e-mail to the employees, no other message (including the "reason for discharge" set out in the December discharge letter) mentions that issue, and at the hearing Markwitz agreed that he has no objection to both "simple" e-mailings and personal telephone calls being made by employees and that he was aware that, among the employees, "there is a certain amount of time during the workday that is not devoted strictly to work." I note that Markwitz acknowledged at the hearing that he knew that Dutton's e-mails to him had been directed also to the other members of the engineering team; Dutton was not admonished or otherwise disciplined.

II. DISCUSSION AND CONCLUSIONS

In *Meyers I*, the Board stated the principles applicable to an alleged discharge for protected concerted activity under Section 8(a)(1) of the Act, and *Meyers II* did not purport to change those principles:[9]

> Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.

Leinweber's e-mailings clearly constituted "concerted" activity as that term has been defined by case law. While *Meyers II* stated that the Board was "fully embracing" (281 NLRB at 887) the rule in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), in which the court held that "mere talk" could be found to be protected Section 7 activity only when it is "looking toward group action," id. at 685, the Board has thereafter repeatedly held that "the object of inducing group action need not be express. For instance, '[i]t is obvious that higher wages are a frequent objective of organizational activity, and discussions about wages are necessary to further that goal.' *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976)." *Whittaker Corp.*, 289 NLRB 933 (1988); *U.S. Furniture Industries*, 293 NLRB 159, 161 (1989) ("[t]he motivating factor for Respondent's action was James Turner's discussion with other employees and with temporary workers assigned to work for Respond-

[9] *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 NLRB 941 (D.C. Cir. 1987), on remand *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C.Cir.).

ent about their wage rate''); *Super One Foods*, 294 NLRB 462, 463 (''Section 7 right to discuss wages''); *Trayco of S.C.*, 297 NLRB 630, 633 (''One of those protected activities is discussions about wages between two or more employees'').

Plainly, in communicating with his fellow employees, Leinweber was attempting to correct any misimpression of the vacation proposal, such as Dutton's, and to arouse support for his own decision to oppose the proposal. Leinweber credibly testified that his purpose in circulating the e-mail was ''because I understood everybody didn't understand and that they needed help in making an informed decision.'' While his ''object of inducing group action [was not] express,'' *Whittaker Corp.*, supra, it is manifest from the record. In *Whittaker*, the Board held that an employee's ''statement at the meeting implicitly elicited support from his fellow employees against the announced change'' and was therefore ''concerted'' activity. Accord: *Morton International, Inc.*, 315 NLRB 564, 566 (1994).[10]

Contrary to Respondent's contention on brief, this is a case of concerted activity for the ''purpose of mutual aid or protection,'' as required by Section 7 of the Act. Leinweber's effort to incite the other employees to help him preserve a vacation policy which he believed best served his interests, and perhaps the interests of other employees, unquestionably qualified his communication as being in pursuit of ''mutual aid or protection.'' While the court in *New River Industries, v. NLRB*, 945 F.2d 1290 (4th Cir. 1991), may have thought, contrary to the Board, that a sarcastic letter was, in Respondent's words, intended ''merely to belittle management,'' here there is no doubt that Leinweber had a specific objective in mind for which he hoped to elicit ''mutual aid.''

Under the precedents, Leinweber's e-mail to Markwitz, with transmission to the other employees, was, in and of itself, concerted activity. The General Counsel also seems to argue that Section 7 was brought into play by the fact that Leinweber discussed with other employees the error in the December 1 memorandum prior to dispatching his e-mails. But *some* showing of employer knowledge of prior employee concert must be made and here there was no such showing. The only employee who reacted publicly to Leinweber's message was Dutton, and that was *after* the message was sent. In the present case, moreover, while Leinweber's testimony on this score is uncontradicted, it is also vague, and indeed, he testified that he sent the December 5 e-mail to the other employees because they did not seem to understand the problem. It could be argued that once Dutton sent his e-mail, he was, to Respondent's knowledge, converting Leinweber's message into concerted activity. See *A.N. Electric Corp.*, 276 NLRB 887, 888–889 (1985). However, on this record, I need not rely on any such theory in concluding that Leinweber's e-mail effort constituted concerted activity. See *Walter Brucker & Co.*, 273 NLRB 1306, 1307 (1984).

While I have found that Markwitz was principally aggrieved by the tenor of Leinweber's e-mail and its perceived personal denigration of Markwitz, his December 9 message to employees establishes as well that a component of his anger was caused by the fact that Leinweber had attempted to enlist other employees in his cause. Although the law of ''protected concerted activity'' does not require the General Counsel to prove that the employer has disciplined an employee because he/she has engaged in concerted activity, but rather only requires that the employer knows that the conduct being disciplined is concerted, the evidence here shows that the concertedness of Leinweber's conduct also very likely infected Markwitz' decision to discharge.[11]

In considering the other elements of a prima facie protected concerted activity case, as outlined in *Meyer I*, supra, there is obviously no question that Markwitz was aware of the concerted activity, nor any doubt that it played the principal role in Leinweber's discharge.[12]

The final question raised by the Respondent is whether Leinweber's December 5 message was ''protected.'' Some concerted conduct can be expressed in so intolerable a manner as to lose the protection of Section 7. NLRB v. *Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). While the legal description of the sort of behavior which withdraws the protection of the Act from concerted activity has varied, *Dreis & Krump Mfg. Co., v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976), quoted recently in *Caterpillar, Inc.*, 321 NLRB 1178 (1996), has often been spotlighted for its statement of the test:

> [C]ommunications occurring during the course of otherwise protected activity remain likewise protected unless found to be'so violent or of such serious character as to render the employeeunfit for further service. [Citation omitted.]

In applying the foregoing or similar standards (e.g., *Will & Baumer Candle Co.*, 206 NLRB 772 fn. 1 (1973): ''so opprobrious as to remove him from the protection offered by the Act''), the Board has invoked a forfeiture of the protection of the Act only in cases where the concerted behavior has been truly insubordinate or disruptive of the work process (e.g., *Postal Service*, 268 NLRB 274, 275–276 (1984); *Postal Service*, 282 NLRB 686, 694–695 (1987); *Finlay Bros. Co.*, 282 NLRB 737, 739 (1987); *Marico Enterprises*, 283 NLRB 726, 732 (1987); *Elion Concrete*, 287 NLRB 69, 73 (1988)). It has generally been the Board's position that

[10] *Daly Park Nursing Home*, 287 NLRB 710 (1988), cited by Respondent, is factually distinguishable.

[11] I note that Respondent's employee manual lists as a ground for discharge, ''Discussing your rate of pay or your compensation arrangement with another employee.'' This would normally constitute an unfair labor practice, see, e.g., *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992); *Heck's, Inc.*, 293 NLRB 1111, 1113 (1989). However, the complaint contains no such allegation and the General Counsel has not, on brief, sought a finding based on this statement. I shall therefore not address the matter further.

[12] To the extent that Respondent referred in the December 9 letter to Leinweber's ''insubordination,'' I regard that as a crutch which played a negligible, and perhaps nonexistent, part in the discharge action. At the hearing, Markwitz made clear that the overriding consideration was the ''tone'' of the e-mail. Leinweber's so-called ''insubordination'' was not a refusal to perform the work which he was paid to do, but was rather, I would think, a determined refusal to apologize for his nominally protected activity (although it is not impossible that Leinweber simply did not really understand what Markwitz wanted from him; see the testimony of Respondent witness Heather Hudson at Tr. 88, 90, and 91). See *Millcraft Furniture Co.*, 282 NLRB 593, 595 (1987) (employee's refusal to accompany manager to his office was ''an integral aspect of Zelaya's exercise of his protected rights rather than an unprotected act of insubordination.''

unpleasantries uttered in the course of otherwise protected concerted activity do not strip away the Act's protection. In *Postal Service*, 241 NLRB 389 (1979), a letter characterizing acting supervisors as "a-holes" was not beyond the pale. In *Harris Corp.*, 269 NLRB 733 (1984), a letter describing management with such words as "hypocritical," "despotic," and "tyrannical" was not disqualifying, despite its "boorish, ill-bred, and hostile tone." Id. at 738. In *Churchill's Restaurant*, 276 NLRB 775 (1985), where an employer discharged an employee who, he believed, was saying that the employer was "prejudiced," which the latter considered an "insult," the remarks were held not "so offensive as to threaten plant discipline," id. at 777 fn. 11. A statement to other employees that the chief executive officer was a "cheap son of a bitch" was considered to be protected concerted activity in *Groves Truck & Trailer*, 281 NLRB 1194, 1195 (1986).

The question of the protected nature of Leinweber's activity is controlled by the latter line of precedents. It is clear from Markwitz' correspondence and testimony that his ultimate decision to discharge Leinweber was based on two aspects of Leinweber's conduct. The major reason was the tone of the letter and the specific remarks about Markwitz. As I have noted previously, it is also evident that Markwitz was displeased by the fact that Weber had communicated the message to the other employees,[13] and that concern entwined with and aggravated, in Markwitz' mind, the first reaction.

Markwitz, like any other employer, wants a friction free working environment. But, as the court of appeals pointed out in *Thor Power Tool*, supra, Section 7 activity may acceptably be accompanied by some "impropriety." And, in *Dreis & Krump Mfg. Co.*, supra, the court of Appeals laid down the rather stiff test of whether the questioned activity is "of such serious character as to render the employee unfit for further service." Surely, the words and phrases used by Leinweber in his message were not that egregious. The Leinweber message has arrogant overtones, but the language is less assaultive than the "boorish, ill-bred, and hostile" wording found not be disqualifying in *Harris Corp.*, supra. Indeed, Markwitz was prepared to retain Leinweber if he would submit some sort of apology, which he failed to do. I find that the message itself was not couched in language sufficiently serious to warrant divestment of Section 7 protection.

A major contention made by Respondent on brief is that the conduct was not protected because Leinweber "took over" the e-mail system. One difficulty with this argument is that, while Markwitz mentioned use of the e-mail in his December 6 message to the other employees, he did not refer to this as a problem either in his December 5 e-mail to Leinweber or in the solicited December 9 discharge letter. At the hearing, when it was suggested to Markwitz that use of the e-mail system was not a predominant factor in the discharge, he agreed, "I don't think so. I think that the tone of the message." The test of protectedness is clearly an objective, reasonable person standard. If in fact an employer is not offended by a particular aspect of the conduct in issue, it seems logical that he/she cannot later conclude that it rendered the employee "unfit for further service."

The only case cited by Respondent which comes close to a "take-over" defense is *Washington Adventist Hospital*, 291 NLRB 95 (1988), but that case materially differed on the facts. There, the employee used the e-mail system to break into and supplant the messages being sent between more than 100 computer terminals in an acute care hospital, thus interrupting transmissions regarding the care of patients, confusing employees who did not know how to eliminate the "break message" from their terminals, and requiring assistance to those employees. If anything, this case is more like *American Hospital Assn.*, 230 NLRB 54, 56 (1977), where a group of employees distributed pamphlets mocking and castigating the employer, leaving the pamphlets on the desk of other employees after hours. The Board said nothing about the potential interruption of work of the employees who discovered the leaflets the next morning. In any event, as previously noted, Markwitz conceded at the hearing that employees were permitted to post "simple" e-mails to each other, to make personal telephone calls, and otherwise to spend some working time in nonwork pursuits. The message sent by Leinweber could not have taken Respondent's employees more than a few minutes to digest.[14]

Respondent's final argument seeks to put *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), into play. That case, however, did not, as Respondent asserts, turn on the fact that some employees "insulted" and "held . . . up to ridicule and disparagement" the company's management and personnel; the Supreme Court, rather, held that public disparagement of the company product was unprotected activity. Id. at 476–477. No such public disloyalty occurred here.

In some cases, the Board has applied the *Wright Line*[15] analysis to protected concerted activity allegations (e.g., *Morton International*, 315 NLRB 546, 566 (1994)), and in others it has not (e.g., *Harris Corp.*, 269 NLRB 733, 739 fn. 19 (1984)). The *Wright Line* Board said that its approach would apply to "all cases alleging violation of Section 8)a((3) or violations [sic] of Section 8(a)(1) turning on employer motivation." 251 NLRB at 1089. It could be said that the sort of case presented here turns on "employer motivation," in that the General Counsel must show that the allegedly unlawful discipline was caused by the protected concerted activity and not some unrelated reason. Once that is proved, however, and it is further concluded that the concerted activity is "protected"—i.e., that no "impropriety" occurred sufficient to strip the concerted conduct of its protection—it could be argued that there would be no room for engaging in the burden-shifting permitted to a respondent by *Wright Line*. Ibid. It is possible, however, that apart from the protected concerted activity, the employee in question could

[13] As indicated earlier, Markwitz wrote the employees on December 6 that the "right way" to handle a "grievance, or a question, or a comment, or a complaint" was to speak to him or one of the other managers. This statement is itself probably violative of Sec. 8(a)(1), see fn. 11, supra, but, for the reasons there given, I will not consider the issue further.

[14] There is no evidence to support Respondent's claim that "the evidence shows the complicated message required substantial time for employees to analyze and assess and caused a considerable amount of consternation among employees because of the unprofessional tone of the message and their confusion regarding what it meant."

[15] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

have engaged in other unrelated and indefensible conduct which would "demonstrate that the same action would have taken place even in the absence of the protected conduct." Ibid. There is, however, no such defense available here.

Finally, although unnecessarily, I address Respondent's contention that "[i]t would be wrong to saddle Respondent for many years into the future with the burden of a reinstated employee the likes of Leinweber." Leinweber is, I concede, a rather unusual person, perhaps one of the new breed of cyberspace pioneers who are attracting public attention, and at the same time —how else can I say it—a bit of a wise guy. Still, in his December 5 e-mail, Markwitz described Leinweber as "talented and intelligent," and he was willing to retain Leinweber after receipt of the offending message if Leinweber would publicly apologize. Markwitz also implored employee Heather Hudson on December 5 to urge Leinweber to write the apology because "he did not want to fire him." I do not gather from this that Markwitz would be totally distraught if he had to rehire Leinweber. In any event, Markwitz' feelings must take second place to the dictates of the statute; the employer who was called a "cheap son-of-a-bitch" by an employee in *Groves Truck & Trailer*, supra, was probably not entirely pleased either.[16]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. By discharging Lawrence Leinweber on December 6, 1995, Respondent violated Section 8(a)(1) of the Act.
3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(7) of the Act.

REMEDY

Having concluded that the Respondent has engaged in an unfair labor practice, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

In addition, having unlawfully discharged employee Lawrence Leinweber, Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Timekeeping Systems, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in concerted activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Lawrence Leinweber reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and, within 3 days thereafter, notify Leinweber in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Cleveland, Ohio, and all other places where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[16] I accepted in evidence, as Board law requires, *Western Publishing Co.*, 263 NLRB 1110 fn. 19 (1982), a document disallowing Leinweber's appeal of his application for unemployment compensation. Because it does not address the issues here presented, I accord the document no weight. I also accepted, conditionally, the transcript of a hearing on Leinweber's appeal, to which the Charging Party objected. The Charging Party is correct in asserting that Board law holds such transcripts to be inadmissible, *Lattimer Associates Limited*, 258 NLRB 1012 fn. 1 (1981), and I therefore reject the exhibit.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."